UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

In the Matter of: C2G LTD. CO., Respondent Employer, and **GENERAL TEAMSTERS LOCAL 959, STATE OF ALASKA, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS**, Charging Party Union,	Cases 19-CA-163444 19-CA-169910

EMPLOYER'S POST-HEARING BRIEF

Respectfully submitted,

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I. INTRODUCTION

This is a dispute between C2G Ltd. Co. ("Employer" or "C2G"), a small disabled veteran-owned business, and General Teamsters Local 959 ("Union" or "Teamsters"). The parties have a collective bargaining relationship that is governed by a collective bargaining agreement ("CBA"). After two arbitrations concerning the issues in dispute between these parties, essentially all that remains at issue in this proceeding, assuming those arbitration awards are not usurped by this proceeding, is whether two employees are entitled to receive 40 hours of vacation apiece, the Employer must change the form of offer letter used for new job offers, and the Employer must disregard the language of the CBA regarding accrual of vacation during the first year of employment because of an innocent mistake. The current dispute essentially focuses on two matters: (1) Counsel for General Counsel ("GC") alleges that an offer letter utilized by C2G for hiring violates the Act in various ways (Amended Complaint ¶¶ 6, 8 and 10), (2) GC alleges that despite the plain and ambiguous language of the CBA, and an Arbitration Award confirming that language, new hires should be paid vacation during their first year of employment because of an alleged past practice arising out of an innocent mistake by a non-supervisory bookkeeper rather than what C2G and the Teamsters actually negotiated into their collective bargaining agreement ("CBA"). (Amended Complaint, ¶¶ 7, 9 and 10). As explained in detail below, the evidence does not support GC's charges, and the Amended Complaint should be dismissed.

II. FACTS

Key Background Information

This remarkably is a particularly complicated set of facts involving multiple individuals, arbitrators and contractual provisions even though the issues were and should be straightforward. Inasmuch as this case has been submitted in large part on transcripts and exhibits from two separate arbitrations, and the ALJ did not hear this testimony live, a brief overview of certain background information may be helpful to the ALJ.[1]

Key Individuals

1. C2G. C2G is the employer who has a contract with the Joint Air Mobility Command to provide services at the Eielson Air Force Base near Fairbanks Alaska. (Bd. Tr. 45:18-21). C2G was awarded this contract in 2012. The prior contractor on site was **CAV International**, which also had a contract with the Union Prior to CAV being awarded the contract, **Trail Boss** was the contractor and it also had a contract with the Union. C2G is not affiliated with CAV or Trail Boss, and had no involvement in negotiations over any prior contract with a former government contractor. (Bd. Tr. 62:18 to Tr. 63:24). Some of the Union employees who worked for C2G also worked for CAV and/or Trail Boss. Union Steward **Ken Johnson** has worked on the base under prior contracts since 1994. (Bd. Tr. 70:15-20).

2. Tom Copeland is the owner and President of C2G, and a disabled veteran with 22-plus years of service in the Air Force. (Bd. Tr. 45:3-9; Tr. 61:3-21).

3. Carol Huggins is and was the bookkeeper for C2G. She is one of four employees who work at C2G's main office in South Carolina. Huggins does not have a

[1] References to the hearing held on April 24, 2018 will be "Bd. Tr. _. "JX-_" references are to the joint exhibits making up the stipulated record.

college degree. She was not a CFO. She did not supervise any employees. She gave herself the title she had. She is not a supervisor, nor did GC allege she was one. (Bd. Tr. 54:1-20), (JX-2, Tr. 349:16-350:2; JX-5 Tr. 356:16-357:6).

4. **Teamsters Local 959** (the "Union") represents Air Cargo Specialists, Air Terminal Operations Controllers, and Customer Service (gate) agents employed by C2G to provide services to the government under C2G's contract.

5. **Jeremy Holan** is the Union's Business Agent who handled the C2G CBA for the Union. (JX-2, Tr. 149:2-44).

6. **Ken Johnson** was the Union Steward for the C2G contract. (Bd. Tr. 66:11-15).

7. **Michael Smith** is a former Union employee of C2G who resigned and then filed a grievance (15-111) contesting the failure to pay vacation that he claimed should have been earned during the first year of his employment. This grievance was subsequently withdrawn. (Bd. Tr. 72:22-74:1).

8. **Arbitrator Richard Ahearn** heard and decided Grievance 15-119 filed by the Union as the neutral arbitrator. (JX-4).

9. **Arbitrator Marshall Snider** heard and decided Grievance 15-1128 filed by the Union as the neutral arbitrator. (JX-7).

Relevant Contract Provisions

In October 2012, the Union and the Company entered into a collective bargaining agreement covering full-time and part-time employees employed under the Company's contract with the United States Air Force under Contract HTC711-12-C-R001. The Agreement (JX-6, JX-1 thereto)[2] provides in pertinent part:

Section 1.01 Recognition. The Company recognizes and acknowledges the Union as the sole and exclusive representative for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment, for the bargaining unit comprised of **all full-time and part-time employees**, including Leads, employed by the Company under Contract HTC711-12-C-R001, and any other successor work performed at Eielson Air Force Base, Alaska, under the aforementioned contract.

Section 1.03 Management Rights. Except as limited by a specific provision of this agreement and supplementary written agreements executed by the parties, the Company shall have the right to take appropriate action in managing the worksite. All inherent and common law management functions, which the Company has not expressly modified or waived in the provisions of this agreement, are retained by the Company. The Company's failure to exercise any function reserved to it shall not be deemed to be a waiver of any such right. With exception to any conflict with the Collective Bargaining Agreement, it is agreed by both parties that the following rights are vested in the Company: The right to manage the worksite and direction of the workforce, the maintenance of order and efficiency, including the right to direct, plan, and control worksite operations, to schedule working hours or production, the right to hire and to release employees because of lack of work or for disciplinary purposes, the right to introduce new and improved facilities, to determine the method of operations, the material to be used, the discontinuance of operations, material or methods of operation, the preparation of production time records or other similar forms and records.

The Union recognizes that the Company is a contractor to the federal government and the Company is required to fully meet its obligations as a contractor. Nothing in this agreement is intended nor will any provision of this agreement prevent the Company from fully meeting its obligations and responsibilities as a contractor. The Union recognizes that the government may impose various legal and/or lawful demands or obligations on the Company and that the Company and its employees must meet such demands or obligations and comply with such rules and regulations as may be promulgated or imposed by the government. Where, however, such new obligations imposed by the government affect the terms and

[2] All bolding is emphasis added.

conditions of the employment of the members of the bargaining unit, the Company will negotiate with the Union the manner in which the new obligations will be implemented. The Company shall be the sole judge of the qualifications of applicants and employees, although the parties acknowledge the Company will not hire an applicant who is prohibited by law or by the United States Air Force from entering the Base, or who cannot obtain the necessary security clearance.(Emphasis added).

Section 2.01 Intent and Purpose. It is the intent and purpose of the parties hereto that this Agreement will promote and improve the industrial and economic relations between the Company and its employees, and to set forth herein the basic agreement arrived at by bargaining on subjects such as those previously described in Article 1, Section 1.01. This Agreement is entered into in consideration of the mutual performance thereof in good faith by both parties. It shall be the duty of the Company and its representatives, and the Union and its representatives, to comply with, and abide by, all of the provisions of this Agreement.

In reaching this Agreement, the parties hereto have fully exercised and complied with any and all obligations to bargain and have fully considered and explored all subjects and matters in any way material to the relationships between the parties. (Emphasis added).

Section 5.02 Extra Contract Agreements. **The Company agrees not to enter into any agreement or contract with employees covered by this Agreement, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.**

Section 7.02 Vacancies. When an existing position becomes vacant, or a new position is created, the Company will fill the opening as follows before filling the vacancy through the bid process:

a. The Company will first identify the occupational classification where the vacancy occurs. Any employees who have bumped from this occupational classification Into another occupational classification will be afforded the right to return to the vacant position before the Company recalls employees from layoff. If an employee declines the opportunity to return to the former classification, the employee's return rights will be terminated.

b. After allowing employees to return to their former positions, the most senior, qualified employee in the occupational classification and on recall will be offered recall to a vacancy in the employee's occupational classification.

c. If there are no qualified employees in the occupational classification, or the laid off employees within the occupational classification decline recall, the vacancy will be filled through the bid process.

Section 7.03 Job Bidding. Job openings shall be posted for a period of not less than three (3) working days, and employees wishing to fill such job opening shall sign their names on the bid sheet. Management will make every reasonable effort to insure all employees are notified of the job opening. Seniority will be the determining factor in the filling of such job opportunity; provided, the employees are equally qualified to perform the work. The employee selected shall have a trial period of not less than thirty (30) working days, after which the employee shall be permanent or, the employee may elect to return to the employee's former position with no loss of seniority.

Section 9.01 Workweek and Workday. Each full time regular employee's work week will consist of no less than thirty-two (32) paid hours. A work period is defined as the time an employee reports to work and terminates twenty-four (24) hours later, where upon a new work period would begin. The Company will rotate personnel equally through shifts and workweeks if there is a need for seven (7) days per week coverage.

a. During the exercise season the Company may hire part time seasonal employees who will not be subject to the thirty-two (32) hour work week requirement. The Company will not use this language in Article 9, Section 9.01(a) to layoff any full time regular employees.

ARTICLE 11
GRIEVANCE PROCEDURE

Section 11.03 Arbitration. Any grievance not satisfactorily disposed of in accordance with the steps of the grievance procedure outlined above may be submitted to arbitration by either party. If the grievance is submitted to arbitration, the arbitrator selection process will commence no later than thirty (30) days; however, this time may be extended by mutual agreement of the parties.

The Company and the Union shall first seek to select an arbitrator by mutual agreement. If the parties are unable to agree, an arbitrator shall be selected pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association. Unless otherwise agreed, all arbitrations shall be processed and conducted in accordance with such Voluntary Labor Arbitration Rules.

The parties agree the decision or award of the arbitrator shall be final and binding on each of the parties and they will abide thereby, subject to such laws, rules, and regulations as may be applicable. The authority of the arbitrator shall be limited to determining questions directly involving the interpretation or application of specific provisions of this Agreement and no other matter shall be subject to arbitration hereunder. The arbitrator shall have no authority to add to, subtract from, or to change any of the terms of this Agreement, to change an existing wage rate or to establish a new wage rate. In no event shall the same question or issue be the subject of arbitration more than once. (Emphasis added).

* * * *

Two particularly key provisions of the contract for purposes of this proceeding are Sections 18.01 and 18.02. They provide:

Section 18.01 Vacation. Employees will earn vacation based on a bimonthly payroll period with twenty-four (24) pay periods per year. Vacation selection will be based on contract seniority. Employees will be allowed to make up to three (3) choices per year. The vacation selection process will begin In November for the next calendar year. The senior person will make his or her first choice and then the next senior person will make his or her choice and It will continue until everyone has made their first choice for vacation. This process will be used for all three (3) selections. The Company will identify how many employees may be off at any one time, prior to the vacation selection process. Any open time available, after the vacation selection process has been completed, may be taken on a first come, first served basis.

Part time seasonal employees vacation will be paid out annually on their anniversary date and will accrue pro-rata based on the following:

a. On date of hire, .038461 per hour.
b. Beginning with an employee's fifth (5th) year of employment, 0.057692.
c. Beginning with an employee's tenth (10th) year of employment 0.076923.
d. Beginning with an employee's fifteenth (15th) year of employment, 0.0961538. (emphasis added).

Section 18.02 Vacation Amounts for Employees. Vacation benefits for bargaining unit employees on the active payroll of the Company are as follows:

a. Eighty hours (80) after one (1) year of employment, accrued at 3.33 hours per pay period.
b. One hundred twenty hours (120) beginning with an employee's fifth (5th) year of employment, accrued at 5.00 hours per pay period.
c. One hundred sixty (160) hours beginning with an employee's tenth (10th) year of employment, accrued at 6.67 hours per pay period.
d. Two hundred (200) hours beginning with an employee's fifteenth (15th) year of employment, accrued at 8.33 hours per pay period.

Vacation pay shall be considered at the employee's base hourly rate. Earned vacation hours as used in this Article shall vest as they accrue.

The Employer's Business Operations

C2G is a service-disabled, veteran-owned small disadvantaged business that contracts with the United States Air Force to provide air terminal and ground handling services for the Air Force at the Eielson Air Force Base in Fairbanks Alaska. (Bd. Tr. 45:18-21; Tr. 46:4- 48:7; JX-2 Tr. 350:17-23). This includes handling passenger traffic in

and out of the Air Force base, and handling the inspection, loading and unloading of air cargo at the facility (including weapons, ammunition, and other military equipment and supplies). *Id.* These services include those provided in connection with the movement of troops, family, and air force units to, from, and through the Air Force base, including for training exercises, deployments, and contingency exercises and operations. (JX-5, Tr. 362:14 to Tr. 365:18). In essence, C2G operates the equivalent of an airport at the base.

C2G employed approximately 55 employees overall in 2015, approximately 10 of whom worked at Eielson Air Force Base. (Bd. Tr. 53:6-14). It has multiple other contracts with the federal government. (JX-5, Tr. 355:10 - 356:7).

The CBA was entered into between the Union and C2G in 2012. (JX-6, JX-1 thereto) The CBA covers air cargo specialists, air terminal operations controller (ATOC), and customer service (gate agents). Air Cargo Specialists are the highest paid, and principally load and unload, and inspect, air cargo. ATOC employees manage air traffic coming into and out of the base, and the customer service employees handle passenger traffic. (Bd. Tr. 46:15 to 47:23).

Bargaining unit employees who work on this contract are required to have a "secret" security clearance. (JX-6, Jt. Ex. 1 at App. A). As noted by C2G's President, Tom Copeland, the cost of obtaining a secret clearance through the Air Force to work on this contract is expensive -- it can cost in the neighborhood of $10,000 per individual. (JX-5, Tr. 380:14-15). Under Department of Defense regulations, a signed offer letter is required to commence application for a temporary, and a permanent, security

clearance. (JX-6, Co. Ex. 5; JX-5, Tr. 389:5-8. The Employer was cited by DOD in 2016 for not having on file copies of all such signed offer letters. (JX-5, Tr. 384:18-385:11.

C2G's contract with the Air Force requires the Company to be available to provide the necessary personnel for air cargo and air traffic services at any time during the year on a 24 /7 basis, when needed and as needed. (JX-5, Tr. 351:17-24. To be available on short notice to provide the necessary services, C2G maintains a regular staff of Air Cargo Specialists, ATOC Controllers and Customer Services (Gate) Agents. Employees work a rotating schedule. All of the employees require a "Secret" security clearance to work on the USAF contract. (JX-6, Jt. Ex. 1 at App. A.

Obviously, with the military involved, there is no set time when a training exercise is scheduled, when there may be a real military action involving the movement of planes, equipment or troops, or when troops or cargo may be deployed elsewhere. As this work was originally performed by Air Force personnel and then contracted out to a private contractor, the Employer must have the staff on hand to meet the Air Force's needs when needed and as needed. (JX-5, Tr. 365:1-13.

Under the Air Force's contract, the "exercise season" as a matter of contract can occur at any time during the year and on short notice. C2G's President, Tom Copeland, explained that under the contract with the Air Force, any deployment or movement of troops or equipment, whether for training or contingency operations, constitutes an "exercise," and the "exercise season" is the entire year. (JX-5, Tr. 365:14-18. The Employer must be prepared to handle any exercise at any time – it cannot be planned for.

Due to difficulties in recruiting and retaining an adequate work force, C2G generally pays its staff 32 hours per week regardless of whether they are classified as full-time or part-time. C2G's President explained that it is difficult to identify, recruit and retain qualified employees with the necessary secret security clearance willing to work in Fairbanks. There is a limited pool of qualified workers in the immediate area (such that a hiring hall would be of no real assistance). (JX-5, Tr. 380:22-381:16. Not only must the individual be qualified, but they must have a security clearance and have the Air Force approve that clearance. This takes time. Accordingly, it is critical to performing the contract that C2G have on staff a sufficient number of individuals with approved security clearances available to work.

The Company, The Union, And The Offer Letters

The Company won the bid for the Air Force contract in 2012, commencing October 1, 2012. (Bd. Tr. 64:7-10). Prior to commencing operations, and before entering into a collective bargaining agreement with the Union, on or about September 28, 2012, the Employer offered employment to the then current Air Cargo, ATOC and Customer Service Agents working on site for the prior employer. All the offer letters specified the position for which the individual was hired, and contained the following standard language:

> All positions will be part time but do not preclude any or all employees from working 32-40 hours per week, or in excess of 40 hours per week depending on contract workload. The Company will in its discretion attempt to normalize work schedules within the constraints of a flexible and changing workload. *See* (JX-6, Union Ex. C.

In connection with the Offer Letter, individuals signed a receipt for an Employee Handbook of C2G. (*See for example* JX-6, U. Exs B-E). The offer letters specifically

referenced the Employee Handbook and stated "Your signature on the enclosed Employee Handbook will signify your acceptance of this job offer." (*See, for example,* JX-3, Co. Exs. 26, 31). Significantly, the Handbook specifically stated that: "In the event employees are covered by a Collective Bargaining Agreement (CBA), those provisions contained in the CBA take precedence over this employee handbook." (JX-6- U.Ex. K). The offer letter also contained language that "Except where otherwise stated or required by law, the terms and conditions of your employment will be set by C2G Ltd. Co. Thus, while C2G Co. Ltd. will continue to provide economic terms included in the predecessor's collective bargaining agreement ("CBA") to the extent required by the Service Contract Act, C2G ltd. Co. is not bound by and does not recognize the CBA of the predecessor. Any initial terms and conditions of employment not already mandated by law or the enclosed Employee Guidelines will be in accordance with C2G Ltd. Co. standard policies, procedures and/or practices. Of course, the Company reserves the right to the maximum extent permitted by law to alter or amend the terms and conditions of employment and its employment policies and procedures. C2G Ltd. Co. has made good faith attempts to reach a CBA, but at time of this offer does not have an executed CBA."(*See for example* JX-3, Union Ex. 35).

Copeland admittedly copied this form of letter from one that had been used by CAV and made slight modifications. (Bd. Tr 65:17-66:10). He subsequently continued to utilize a slightly modified version for all persons hired thereafter, including persons who accepted an offer into a new position. There is no evidence that the offer letter was intended or drafted so as to interfere with the CBA or employee rights thereunder. (Bd. Tr. 78:10-79:11).

Ken Johnson, who was serving as a Union steward for the prior employer (CAV), and continued as a Union steward after being hired by C2G informed the Union of this letter at or about the time of negotiations. (JX-5, Tr. 222:21-223:9, JX-2, Tr. 319:18-320:13).[3]

The first round of offer letters in 2012 were sent out before there was a CBA and before C2G had hired its full complement of workers. (JX-5, Tr. 420:6-420:9). While in the process of hiring its full complement of employees, the Company engaged in negotiations with the Union over a new collective bargaining agreement. (JX-5, Tr. 419:17-420:12). As part of these negotiations, the Employer agreed (a fact that has not been contested by the Union) to grandfather the existing staff and credit them with service credit from the date they commenced working at the facility and to treat them as full-time employees in their current positions notwithstanding the prior offer letters. (JX-5, Tr. 426:7-427:13). This understanding superseded the prior offer letters. The Union has never disputed Copeland's testimony on this point, nor claimed the parties did not agree to treat them as full-time. Indeed, Copeland noted that Section 9.01, and its reference to full-time regular employees, was directed to this issue in part.

[3] The Union had represented the bargaining unit employees of the prior employer under a contract that Copeland used as a starting point. (JX-6, Union Ex. I). The prior employer had utilized a similar offer letter for its bargaining unit employees to that used by C2G, including the part-time language quoted above. (*See* JX-6, Co. Ex. 12). This was the case even though the prior contract did not include separate language for accrual of vacation for part-time employees. Essentially, the prior employer hired individuals as part-time employees but elected to have everyone accrue vacation at the same rate, and be guaranteed at least 32 hours (36 hours for ATOC positions). In contrast, C2G negotiated a separated accrual rate for part-time seasonal employees. Mr. Copeland was a consultant to CAV for part of the contract but was not involved in contract negotiations. (Bd. Tr. 62:14-63:24).

Although the CBA was effective October 1, 2012, it was not signed until October 4, 2012. (JX-6 Jt. Ex. 1). This meant that no contract was in place when the 2012 offer letters were sent to the initial group of employees, and before C2G had hired its full complement of workers pursuant to which there was any duty to bargain. (Bd. Tr. 64:9-13). Union Steward Ken Johnson received such a letter and informed the Union about the letter. (JX-5, Tr. 222:18-223:13).

The contract negotiated by the parties included language regarding part-time seasonal employees and accrual of vacation and holiday pay for part-time seasonal employees. Although the prior government contractor (CAV) hired everyone using offer letters that contained the same part-time language as that used by C2G, the prior contractor treated everyone the same for purposes of hours guaranty and vacation accrual. (JX-2 Tr. 366:17-366:22; JX-3, Union Ex. 25).

In contrast to the CAV contract, Copeland negotiated additional language into its CBA on benefits for certain part-time employees and certain other issues in exchange for adding certain benefits and a 4% and 5% increase in the final two years. (JX-5, Tr. 416:12-17). These increases were the largest increase in wages that the Union had received from any prior contractor according to the agreements introduced by the Union in the arbitrations and Copeland's undisputed testimony.(Bd. Tr. 64:14-20).

In the course of the Snider Arbitration, Union Business Agent Holan discussed the form of offer letter. Mr. Holan testified:

> Q. Now, in the current grievance, joint two, which is 128, are you saying that you want the company to cease using offer letters?
>
> A. The offer letters that they changed the interpretation of the and September 2015, yes.
>
> Q. So do you have a problem with the company's sending offer letters or just sending those offer letters?

> A. Those offer letters, the at- will portion of it. The part-time /full time status language violates our collective bargaining agreement and then the language that violates the company's own handbook, which is under the exception part of it. The employee handbook is actually states that the CBA supersedes the employee handbook, but yet the … offer letter contradicts what the employee handbook states,
>
> Q. Well, you are not disagreeing that the-under the parties' contract everybody agreed that the CBA would control-would supersede and the other terms, correct?
>
> A. That is correct. The … CBA takes precedence over the employee handbook, and we believe the offer letters. (JX-5, Tr. 106:20 to Tr. 107:16..

Over time, the number of individuals employed under the CBA reduced by way of attrition. (JX-5, Tr. 438:3-20). Subsequently, as additional positions came open, new individuals were hired. Each of these individuals was offered employment in a part-time position pursuant to an offer letter that contained the specific language quoted above. All of the individuals signed the offer letter and accepted the position. After being hired, all of them were paid for at least 32 hours per week on a regular basis due to staffing needs.

Because the newly-hired part-time employees could work far more than 32 hours, it is possible that an employee could earn more vacation under Section 18.01 than under the rate applicable to full-time employees under Section 18.02. (Bd. Tr. 67:12-18). That is because 18.02 vacation accrues at a flat rate regardless of the number of hours worked, whereas under Section 18.02, part-time seasonal employees accrue vacation based on the number of hours actually worked.

In April 2014, the Employer had an open part-time position for an ATOC Controller. (JX-6, Co. Ex. 17. This is a less physically rigorous strenuous positions than the Air Cargo Specialist position, but also carries a lower pay rate. Bd. Tr. 69:1-23.

At that time, a current employee, Richard Tulietufuga, was scheduled for surgery due to a non-work related injury and had almost exhausted his paid time off. (Bd. Tr. 65: 3-21). Tulietufuga elected to bid for the open ATOC position. (JX-6, Co. Ex. 17). He was provided an offer letter for the position which specifically stated it was a part-time position. (JX-6, Union Ex. C). He signed the offer letter and accepted and agreed to that position.[4]

The offer letter contained the language that "All positions will be part-time, but do not preclude any or all employees from working 32-40 hours per week, or in excess of 40 hours per week depending on contract workload." Like the offer letters noted above,

[4] Tulietufuga claimed he approached the Site Manager, Jeff Carpenter, about the part-time language in the contract. JX-5, Tr. 243:5-22. According to Tulietufuga, Carpenter told him this was an ATOC position that was guaranteed 36 hours under the contract, and nothing would change. JX-5, Tr. 243:15-22. Carpenter no long works for C2G, having resigned in July 2015. Bd. 80, Tr. 11:17.

The Employer did not have an opportunity to call Carpenter as a witness because, as Copeland testified, both Carpenter and David Emig stopped working for C2G in 2015 in the August, September time frame. Copeland testified: "Q Okay. So did you have any idea before we showed up at the arbitration that you were going to hear a bunch of testimony or evidence of material about Mr. Carpenter? A It -- it was never raised. Mr. Holan never raised it in any of our grievance proceedings or processes. It was never raised by any of the employees to our level. It was never raised by Mr. Car -- I mean, it's convenient, because Mr. Carpenter and Mr. Emig are no longer employees and -- and with -- it was never raised by Mr. Emig or Mr. Carpenter who knew that all the employees were issued part-time hire offer letters, because they issued them. They're the ones that physically handed it to them and they can read, and they read exactly what the letter is offering, and so they knew. They handed them the letters. Q When you hear testimony here about people claiming that Mr. Carpenter said everything was going to be without change, what does that mean you? A Well, I -- I can't speculate like -- because I'm not really sure, but to me, that means that our policy of continuing to pay them 32 hours, they were going to continue to get paid 32 hours, because that's what we do. We -- in order to keep the workforce and keep the morale in the -- we normally pay everybody; you know, we want to keep them on there for 32 hours. It's just -- it's just good business to keep a good workforce, and, again, the cost of the security clearances and so forth.(JX-5 Tr. 391:22-394:24).

the offer letter specifically referenced the Employee Handbook and stated "Your signature on the enclosed Employee Guidelines will signify your acceptance of this job offer." (JX-3, Union Ex. 35). It also specifically referenced eligibility for health care and retirement plans subject to the CBA. (*Id.*).The offer letter also contained language that "Except where otherwise stated or required by law, the terms and conditions of your employment will be set by C2G Ltd. Co. Thus, while C2G Co. Ltd. will continue to provide economic terms included in the CBA any initial terms and conditions not otherwise mandated by law or addressed in this letter or enclosed Employee Guidelines will be in accordance with C2G Ltd. Co. standard policies, procedures and/or practices. Of course, the Company reserves the right to the maximum extent permitted by law to alter or amend the terms and conditions of employment and its employment policies and procedures. (JX-3 Union Ex. 31). There should be no dispute that the other offer letters issued after 2012 are the same with respect to the above language and included the same references and otherwise are the same or markedly similar.

The only way under the collective bargaining agreement to be hired into an open position is through the bid process provided for in Article VII of the contract. (JX-6, Jt. Ex. 1. Tr. 59:5-12). The bid procedure must be followed and there must actually be an open position. The evidence is uncontroverted that at the time Richard Tulietufuga, received his offer letter, he informed Union Steward Ken Johnson about the part-time language in the letter, and Johnson in turn informed Business Agent Jeremy Holan. Union Steward Kenny Johnson told Holan that Johnson had received such a letter in 2012 as well. (JX-5, Tr. 222:18-223:13). In testimony, Johnson confirmed that at the time of the negotiations over the new contract in 2012, he had told the Union about the

part-time offer letters. (JX-5, Tr. 222:18-223:13. And, Johnson and Business Agent Jeremy Holan, the Union confirmed they also knew in May 2014 that the Employer had been sending out offer letters of this nature. (JX-2, Tr. 252: 19- 255:11; 257:1-4. According to Holan: "In my line of work, I see letters like this. A lot of the companies that have numerous areas that are union and nonunion, it's a standard form letter. And with the manager telling him [Richard T] that nothing was going to change, it didn't raise nay red flags for me, because the contract would prevail at that point." (JX-3 254:17-23). Holan noted that "I mean, you see them in the back of employee handbooks, also, that say you're at will, but it –it is also signed saying that a - - the CBA prevails. So there would have been no issue, because he was being paid at that time as full-time. (JX-3 Tr. 255:3-7). Holan further testified that "After Jeff Carpenter, the manager, had told him [Richard T] that nothing was going to change, it was – he signed it in 2012. It dropped the red flags because it was just, to me, another job offer, a standard form the company uses. The CBA is going to prevail. And so we did not move forward with it." (JX-3, Tr. 258: 2-10).

Thus there is no question that in 2014, and as early as September 2012, the Union **knew** the Employer had been sending out offer letters of the type now objected to by the Union and GC as direct dealing and unlawful. There is no question the Union **knew** the letters contained the type of language which the GC claims is unlawful. And, there is no question the Union was aware of all the language regarding at will, changes in terms of employment, and the like now claimed as a violation of the Act, but it was not a concern. Indeed, there is no evidence that the Union or the Union members ever considered that the offer letters took precedence over the CBA, created at will

employment, or gave the right to make changes to employment terms and conditions. Indeed, even when the Union became embroiled in subsequent disputes in 2015 over vacation accrual, the particular language that is now a major point of contention by the GC was not an issue. The Union knew the CBA would prevail.

Nevertheless, the Union did not file a Board charge or a grievance in 2012. The Union did not file a Board charge or a grievance in 2014. No Board charge was filed until November 2015, more than a year later and only after the parties could not resolve the grievances over vacation accrual and part-time status and had proceeded to arbitration.

Subsequently, within the next 90 days, Mr. Tulietufuga was medically cleared to return to work as an Air Cargo Specialist. When a position came open in Air Cargo in August 2014, Tulietufuga bid for that position. (JX-6, Co. Ex. 20). He then was provided an offer letter specifying this was a part-time position. (JX-6, Union Ex. C). Tulietufuga accepted and agreed to this offer and returned to work in Air Cargo. He never filed a grievance about this second offer letter.

In August 2015, a second open position was posted for an ATOC Controller. (JX-6, Co. Ex. 13). Another current Air Cargo Specialist, Phillip Finney was scheduled for surgery for a non-work-related injury. He had exhausted his paid leave and could not physically work as an Air Cargo Specialist. Finney elected to bid for that open position. (JX-6, Co. Ex. 13, JX-6, Bd. Tr. 70:21-71:6). At that time he was provided an offer letter indicating this was a part-time position and containing the same basic language outlined above. Finney accepted and agreed to the offer and signed the offer letter. (JX-5, Union Ex. C. p. 11). He has continued as an ATOC Controller since bidding into that position.

Copeland Discovers An Error In Accrual Rates For Vacation

In 2015, a dispute arose concerning vacation owed to Mike Smith, a Customer Service Gate Agent who had elected to resign shortly after completing his first year of employment. Like the other new hires, Smith signed a standard offer letter containing the part-time employment language after being offered a position in 2013.

The Company's bookkeeper, Carol Huggins - who was not an executive, but a bookkeeper who handled payroll and did not have access to the Employer's personnel files or offer letter – erroneously loaded Smith into the system as a full-time employee. (JX-5, Tr. 406:17-22; 434:23-435:6). As a result, she erroneously applied Section 18.02 of the contract for vacation accrual purposes. Huggins credited and paid Smith for vacation earned during the few months he worked after completing his first year of employment because she assumed, incorrectly, that Smith was a full-time employee when in fact, unbeknownst to her, Smith had signed an offer letter with the standard part-time language.

Because Huggins assumed Smith was a full-time employee, she did not credit him with any vacation accrual during the first year of employment, consistent with the language in Section 18.02. When Smith resigned and saw his last paycheck, he questioned why his vacation hours had been changed. (JX-3. Exhibit 11).[5] Huggins responded in an email to Smith informing him that: "Yes, I was mistakenly accruing vacation before you were eligible. You were not eligible for accrual of vacation hours

[5] As Copeland noted in his testimony, Huggins did not have access to Smith's personnel records and therefore did not know Smith had signed a part-time offer letter. (JX-2, Tr. 384:6-384:16). She apparently assumed Section 18.02 of the contract applied.

until you reached one year of employment. I apologize for the inconvenience." (*Id.*). In a follow-up email that same day, Huggins further elaborated on this issue. (*Id.*). She referred to Section 18.02 of the CBA and told Smith: "I had inadvertently been crediting you with leave from the date of hire by mistake" and therefore he had been overpaid previously on vacation. (*Id.*). Huggins further explained that she "had not caught this previously because none of the new recent hires had tried to take leave yet. Chris Jones attempt [sic] to take leave and that is when it was noticed. While we wish it had never happened, the fact is there is no entitlement earned until after one year." (*Id.*). She also noted that she had called and explained "that error for all the recent hires yourself, Chris Jones, Glenda Evans and Allen Matthews to [Station Manager] Dave and asked that he inform you of the error and that I was making the corrections to pay stubs but obviously the older pay stubs would have still had the incorrect amounts.. Unfortunately you were already resigned apparently before they could contact you." (*Id.*).

Holan then called C2G's corporate office and spoke to Copeland, at which time Copeland checked with the bookkeeper, who told him Smith had been paid properly, and communicated that to Holan A grievance then was filed on behalf of Smith.

Copeland provided a detailed account of his involvement in the events relating to the Smith grievance and the 15-119 vacation pay grievance both in the Ahearn Arbitration and the Snider Arbitration. Rather than repeat that testimony verbatim here, C2G refers the ALJ to the testimony that can be found at JX-2 Tr. 379:21-382:15, and JX-5 Tr. 421:1- 424:2, and provides a summary below.

The Union filed a grievance (15-111) on or about August 15, 2015, seeking vacation pay for the first year of employment for Mr. Smith. (JX-6, Union Ex. L). Shortly thereafter, within 10 days, the Union filed grievance 15-119 on August 25, 2015. Grievance 15-119 challenged the manner in which the Company was interpreting Section 18.02 of the contract (i.e. not crediting new hires as having earned vacation during the first year of the contract) and requested that C2G credit all members with vacation accrual during the first year of employment. (JX-6, Union Ex. N).

The Company's Station Manager David Emig responded that pay and vacation matters are processed by the Accounting Manager, that he was not authorized to negotiate contract changes, and that only the President and Chief Operating Officer could so obligate the Company. The matter then proceeded to Step 3.

Grievance 15-119 as filed was limited to whether the Employer violated the contract by not accruing vacation for an employee during the first year of employment. It was filed even though the Smith grievance raised a similar issue. Subsequently, the Union attempted to change the focus of grievance 15-119.

The two grievances continued on separate tracks but in a relatively close time frame. Prior to the Smith Grievance being filed, the Smith grievance proceeded to Step 3 before C2G's President, Tom Copeland. Mr. Copeland did not know Mr. Smith, and in preparing for the Step 3 meeting made it a point to check his personnel file. (JX-5, Tr. 422:10-13). At that time he discovered that Mr. Smith had been hired as a part-time employee according to his offer letter, and that Ms. Huggins had been operating under an erroneous assumption regarding Mr. Smith's status. (JX-5, Tr. 422:14-22). Copeland recognized that because Mr. Smith had been hired as a part-time employee, he

therefore should have accrued vacation under Section 18.01 of the contract from day 1, rather than just after the first year. In his words, he found himself in a "catch 22:" His position was inconsistent with the personnel records and offer letter because the records showed he was a part-time employee and C2G had been relying on provisions of the contract applicable to someone who was not a part-time employee (Section 18.02). (JX-2, Tr. 382:3-382:10).

Copeland concluded C2G could not continue the position taken in the grievance process if he was going to live up to the contract. (JX-5, Tr. 423:17-23). In an effort to comply with the contract, Copeland accordingly had his bookkeeper recalculate Smith's vacation pay per Section 18.01 of the contract, based on hours worked from date of hire, and paid him that amount at the Section 18.01 rate. According to Copeland's testimony, Smith was paid in accordance with Section 18.01 of the contract per his office's calculations. (JX-5, Tr. 424:7-8). Even Holan agreed that it was "very possible" Mr. Copeland believed he was paying Smith as if he were a part-time employee. (JX-5, Tr. 97:22-98:1).[6]

As a result of the Smith grievance, Copeland realized that his bookkeeper had been calculating vacation under Section 18.02 for all employees, including (erroneously)

[6] The Union claims Smith was not paid based on the number of hours worked, but instead was paid was paid as if he were a full time employee accruing vacation from date of hire. The Union and Mr. Smith claimed he was owed a certain amount of additional vacation and the Employer recalculated under the part-time formula and determined he was owed even more. The Company disputes this claim. Regardless of who is correct, the Union did not pursue this issue to arbitration on behalf of Mr. Smith and there was no formal settlement. (JX-5, Tr. 98). Regardless of whether the Union believed Smith was paid out as a full-time employee, that is not what the Employer believed and determined, and in fact, the Employer paid him more than the amount Smith claimed under the accrual formula in Section 18.02.

those individuals hired after October 2012 as part-time employees into an open part-time position. It is uncontradicted that Ms. Huggins was not involved in the hiring process and did not have access to the personnel files. Nor was she aware the employees were part-time until Copeland informed her. (JX-5, Tr. 425:8-22). Consequently, she had been erroneously assuming their vacation should be calculated in accordance with Section 18.02. As Copeland testified, there were two errors by Huggins: First, as noted above in her email to Smith, Huggins had been accruing vacation for these individuals during the first year of employment even though she had erroneously loaded them into the system as full-time employees. Second, she had inadvertently loaded the individuals hire dafter 2012 into the payroll system as full-time employees when they had actually been hired as part-time employees. (JX-5 Tr. 434:11-435:9).

After discovering this error, in order to ensure consistent treatment, Copeland made the same correction for anyone else hired after the initial assumption of the contract whose offer letter indicated the person was a part-time employee, and recalculated their vacation under Section 18.01. (JX-5, Tr. 423:21-424:6, 434:11-17). Mr. Copeland also did this to ensure that the part-time employees could begin taking vacation they had earned since date of hire, rather than not accruing any vacation in their first year of employment in the new position. (JX-5, Tr. 445:7-21). Huggins zeroed out everyone who was affected, and then recalculated everyone according to the 18.02 rate. [7] (JX-5 Tr. 434:11-435:9).

[7] It should be noted that C2G's interpretation of the CBA was that section 18.01 applied to the individuals hired as part-time employees after 2012.

As Copeland testified, this correction was not extended to persons who were offered and accepted a position in September 2012 who were still holding those positions. This was because of the agreement made at the time of the initial contract that the individuals in those positions would be grandfathered and treated as full-time. (JX-5, Tr. 426:12-18). And, because their seniority date was credited as being from the initial date of hire at the facility (dating back years), the first year-no accrual rule did not apply. Jt. Ex. 1 at §6.01, (Bd. Tr. 9:7-9:24; Bd. Tr. 70:6-70:20. This testimony not controverted by the Union.

The employees who were offered and accepted employment in a part-time position were Phillip Finney, Richard Tulietufuga, Glenda Evans, Allan Matthews, and Chris Jones (now a supervisor). Mr. Finney and Mr. Tulietufuga were subject to the re-calculation because they had subsequently bid into and accepted a new position in a part-time position. (JX-5, Tr. 436:8-438:2; 443:25-444:3). And, because their seniority date was credited as being from the initial date of hire at the facility (dating back years), the first year-no accrual rule did not apply. (JX-6, Jt. Ex. 1 at §6.01). The grandfather provision only applied to the positions held at the time in 2012 when the contract took effect. (JX-5, Tr. 426:3-18; 427:6-25).

In this regard, GC made a significant issue about pay stubs provided to these individuals in late August or September of 2015 and indicating they reflected zero accrual of vacation. In fact, as Copeland noted, this was due to a software glitch of some sort. (Bd. Tr. 115:6-23). In fact, even in those cases where a zero was recorded for the particular pay period, the amount of vacation balance that was recorded as

accumulated actually increased from pay period to pay period by the correct contractual amount. (*Id.*) [8] Thus, employees were not being denied vacation pay. [9]

On September 28, 2015, the Union filed Grievance 15-128. This grievance claimed the Employer violated the contract by hiring persons as part-time employees. The grievance stated:

> On September 20, 2015, in a response email to the Union's information request from Mr. Copeland for grievances 15-119 and 15-111, Mr. Copeland changed the Company's response regarding how the employees do not accrue vacation hours in the first year of employment to how the Company has hired employees as part time and accrue their vacation hours at the part time seasonal rate. Our negotiated contract does not have part-time employees; it only has part-time seasonal employees and full-time regular employees. There are new hires and employees that took new positions in the Company that have been affected by the Company's violation of the CBA. In addition; on September 21, 2015, during our Step Three meeting, Mr. Copeland supplied the Union with letters the Company had the employee's sign which clearly violate the CBA and is considered direct dealing.
>
> Based on the above information, the Company is in violation of 1.01, 2.01, 2.03, 7.01, 7.02, 9.01, 13.01, 18.01, 18.02 and any other articles/sections that may be applicable of the CBA.
>
> The remedy the Union is requesting is for C2G to cease and desist with direct dealing, follow the terms and conditions of the CBA, and to properly classify employees filling full-time vacancies as full-time employees, rather than as part-time employees.

Jt. Ex. 2

Not to be undaunted, the Union moved back to Grievance 15-119. On or about October 6, 2015, after meeting with the Company at Step 3, and after filing Grievance 15-128, the Union demanded arbitration of Grievance 15-119 and, at the same time, sought to modify grievance 15-119 to include not only the issue about whether vacation accrues during the first year of employment under Section 18.02, but also to attempt to

[8] It also is possible that a zero out was a result of the zeroing out process Copeland testified that Huggins followed to calculate vacation. (JX-5 Tr. 434:11-435:9).

[9] It should be noted in this regard that pay stubs are not some legally binding agreement. Copeland noted that corrections to pay are not uncommon. (Br. Tr.54:24-55:14).

include a challenge to the Company's position that the five individuals were hired as part-time employees and accrued vacation under Section 18.01 of the contract. (Union Ex. L).

These two grievances proceeded to arbitration, each before a separate arbitrator. There was a two and one-half day hearing before Arbitrator Ahearn on Grievance 15-119, and a two day hearing before Arbitrator Snider on Grievance 15-128.

Arbitrator Ahearn issued two principal rulings as to Grievance 15-119 -- both tied to the question of how the employees in question should have earned vacation under the CBA: First, Ahearn concluded that the employees in question were not "part-time seasonal employees" within the meaning of Section 18.01 of the contract and therefore did not earn vacation from date of hire. Second, he concluded that because the employees were not "part-time seasonal employees" within the meaning of Section 18.01 of the CBA, then Section 18.02 of the contract applied. (JX-4). Under Section 18.02 of the contract, Arbitrator Ahearn agreed with the Employer that the employees do not earn and accrue vacation during the first year of the contract based on the plain and unambiguous language of the labor agreement. (JX-4, page 22).

Arbitrator Snider issued a separate ruling on different issues as to Grievance 15-128. He found that the Employer did not violate the contract by hiring part-time employees, or by sending offer letters, and denied Grievance 15-128. (JX-7).

After the Ahearn Award was issued, all the employees in question have, consistent with the Ahearn Award, accrued vacation at the 18.02 rate. And, as stipulated by the parties, all of these individuals had their vacation for periods prior to the Ahearn Award recalculated and corrected as if they were accruing vacation in

accordance with Section 18.02 of the CBA, at the 18.02 rate, from the date of hire or the date of hire into a new position, as applicable. (Bd. Tr. 783:20; JX-1, Stipulated Facts). As a consequence, only two current bargaining unit employees, Evans and Matthews, would, under GC's theory of the case, be owed any additional vacation attributable to the first year of employment on account of the time frame when they were initially hired.

II. ARGUMENT

A. THE SECTION 8(a)(3) ALLEGATION SHOULD BE DISMISSED BECAUSE COUNSEL FOR GENERAL COUNSEL HAS NOT SHOULDERED HER BURDEN OF PROOF. ALTERNATIVELY, C2G WOULD HAVE TAKEN THE SAME STEPS ABSENT ANY ALLEGED ANTI-UNION ANIMUS.

Paragraph 9 of the Amended Complaint asserts a Section 8(a) (3) violation based on C2G's actions in first asserting at the time Smith resigned in 2015 that no vacation accrued in the first year of hire, and then subsequently correcting the vacation accruals for all post 2012 part-time hires after discovering these employees had inadvertently not been treated as part-time employees covered by 18.01 of the CBA. GC claims these actions were in retaliation for Smith and the Union filing the vacation grievances (15-111 and 15-119) in 2015.

The burden of proving this alleged 8(a)(3) violation falls on the GC. United Broadcasting Co., 253 NLRB 697, 703 (1980) citing Gonic Manufacturing Co., 141 NLRB 201, 209 (1963). GC did not meet her burden, and for multiple reasons Paragraph 9 should be dismissed – a conclusion that is readily apparent from a review of the underlying allegations.

Broadly speaking, there are two groups of C2G employees. First, there are the former CAV employees who had been working for the prior contractor (and in some

cases several prior contractors) and had been hired at the time C2G took over the contract October 1, 2012. C2 and the Union agreed these employees would be (a) full-time and (b) would receive credit for time served with the prior employer, CAV. (JX-7, page 7), second full paragraph; (Bd. Tr. 70:6-20). In effect, this meant these employees would accrue vacation under Section 18.02 and would accrue (due to the prior seniority credit) vacation from date of hire without application of the one year of service condition to earning vacation under Section 18.02. (*Id*.) [10]

While at a grievance meeting in September 21, 2015 Copeland did state his position that employees covered by Section 18.02 needed to work a year before accruing vacation (JX-5, Tr. 92:9 to Tr. 94:8),[11] this interpretation of Section 18.02 did not impact the pre-October 2012 hires. (JX-5, Tr. 102:10-23). It did not even impact Tulietufuga and Finney: who, as found by Arbitrator Snider (JX-7, pages 7-12) had bid into properly created part-time positions (i.e. they already had their year of service in). (Bd. Tr. 72 6-21; Tr. 77:23 to Tr. 78:2).

The second group of employees at the Base were those hired <u>after</u> October 2012. The first employees in this group were hired beginning April 2014. (Bd. Tr. 66:19-24). As stated in their offer letters, they were hired part-time.[12] Copeland

[10] Thus, the allegation in ¶7(d) of the Amended Complaint that "employees hired before October 1, 2012, … did not accrue vacation during their first year of employment", is wrong. As GC conceded in her opening statement, the pre-October 2012 employees did receive vacation their first year and were not impacted by Copeland's position concerning either the meaning of Section 18.02 or the part-time status of post-October 2012 hires. (Bd. TR. 9:7-24. *See also* Bd. Tr. 70:6-20).

[11] A position Arbitrator Ahearn agreed with. (JX-4, page 22).

[12] Arbitrator Snider agreed that the employees were part-time. Thus, one of the issues framed by Arbitrator Snider was whether C2G "violate[d] the collective bargaining

acknowledged at a grievance meeting that the part-time employees were entitled to vacation accrual under Section 18.01 from the date of hire.

GC's Section 8(a)(3) case is based on the theory that C2G switched its position from: (a) employees hired April 2014 and thereafter were Section 18.02 employees not entitled to vacation accrual their first year of employment, to (b) these post-April 2014 hires were entitled to immediate vacation accrual under Section 18.01.[13] She claims this was in retaliation for asserting the vacation pay grievance. This is not a basis for a Section 8(a)(3) claim because:

1. There is no proof of anti-Union animus. Section 8(a)(3) absolutely requires proof that C2G's actions were driven by anti-union animus. Central Illinois Public Service Co., 326 NLRB 928, 930 (1998) ("Anti-union motivation is an essential element of a [Section]8(a)(3) violation"); citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 700 (1983); C&S Distributors, Inc., 321 NLRB 404, 407 (1996).

Anti-union motivation is not something that is assumed -- it is something GC must prove. Webco Industries, 334 NLRB 608 fn. 3 (1996). ("[GC] must establish that

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agreement when it offered part-time employment to bargaining unit members, or treated affected bargaining unit members as part-time employees … ?" (JX-7, page 2). Arbitrator Snider denied the grievance in all respects. (*Id*., page 20. *See also Id.,* pages 17-19). However, in accord with Arbitrator Ahearn's decision, they were not seasonal part-timers. Therefore, these part-time employees accrue vacation under Section 18.02 only. after 1 year of employment. Arbitrator Snider's ruling that C2G properly offered part-time employment encompassed Tulietufuga and Finney. JX-7, pages 10-12. When vacation begins accruing did not impact them as they each had well over a years' service. (Bd. Tr. 72:6-21).

[13] GC's Section 8(a)(3) theory cannot be based upon Copeland's assertion that Section 18.02 required a year of service before vacation accruals began . That position was what triggered the grievance in the first place. The pre-October 2012 employees kept their vacation accruals. (Bd. Tr. 10:12-17; Tr. 72:6-27).

the employees protected was, in fact, a motivating factor in [Respondent]s challenged] decision"); Raysel-Ide, 284 NLRB 879, 880 (1987) quoting Briarwood Hilton, 222 NLRB 986, 991 (1976) ("To find a violation of Section 8(a)(3), the evidence must permit a positive finding … that union activity was a contributing factor in the [challenged] decision …") (parenthetical added). A finding of animus must be based on proof not conjecture. Abby Island Park Manor, 267 NLRB 163, 170 (1983) ("conjecture" while "conceivable", not enough to prove violation). The burden of proving that C2G took the position that those hired after October 2012 were part-time was motivated by anti-union animus is a heavy one, as the law presumes that employers act in conformity with their obligations under the law. Pelton Castell, Inc. v. NLRB, 627 F.2d 23, 30 (7th Cir. 1980) ("[We] will not lightly infer the existence of an unlawful motive …").

GC has not adduced evidence of anti-union animus. At best she presented a case based on pure speculation. That is insufficient. Delco-Remy Div., General Motors v. NLRB, 596 F.2d 1295, 1305 (5th Cir. 1979) ("Mere suspicions of unlawful motivation are not sufficient … "); Weather Tanner, Inc. v. NLRB, 676 F.2d 483, 492 (11th Cir. 1982) (same); NLRB v. Arkema, Inc., 710 F.3d 308, 322 (5th Cir. 2013) (same); Pullman Power Products, 275 NLRB 765, 767 (1985) ("Mere speculation cannot replace evidence"). No anti-union or retaliatory statements by Copeland are cited in the Amended Complaint and there is no proof of any such type of statement in the record of either arbitration hearing. In reality, the evidence points in the opposite direction of animus. (Bd. Tr. 76:9-21; Tr. 78:21 to Tr. 79:11).

C2G has never before been found to violate the Act. (Bd. Tr. 53:16-22). Its owner, Tom Copeland, is a disabled military veteran. His entire adult life has been

dedicated to defending the rights of Americans, not infringing them. (Bd. Tr. 61:3-7). That background does not bespeak a man who would retaliate because a grievance was filed. Copeland is a straight-shooting with years of military service. He may tend to come across as somewhat blunt in writing due to his military background, but it is clear he is someone who is a straight shooter who can be direct when speaking. Copeland testified credibly that he did not take any action in retaliation against the Union . He credibly explained this entire dispute was a consequences of some innocent mistakes by a bookkeeper. All he tried to do was act in a manner consistent with the contract. In fact, when confronted with the Smith grievance, he decided he was in a catch 22 because his position initially was based on an assumption Smith was subject to 18.02 when in fact he discovered he was part-time. This was to C2G's economic disadvantage. All Copeland did was try to treat consistently everyone with a part-time offer letter who was hired into a new position or as an employee after 2012.

In this case, there was no evidence of anti-Union animus presented. In fact, the evidence that was presented shows the employer was not opposed to unions. C2G has not been subject to a prior Board charge. (Bd. Tr. 53:16-22). C2G initially hired a workforce from CAV employees who worked at the site and had been represented by the Union. It quickly entered into a contract with the Union that granted the workers at the base the largest wage increases of any prior employer represented by the Union. (JX-5; Tr. 141:11-14). And, there should be no dispute that C2G entered into a subsequent contract with the Union in 2016. Certainly, Copeland's personnel background and C2G's history of cordial union relations undermines any claim of animus. Asarco, Inc. v. NLRB, 86 F.3d 1401, 1408 (4th Cir. 1996) ("[A]n anti-union

attitude cannot be lightly inferred onto an employer with a history of good union relation ….").

In fact, the record is clear that Copeland was just trying to do the right thing even when it was adverse to the initial position taken by C2G. Copeland's positions are reflective of logic not animus. The employees hired beginning April 2014 did receive a letter saying they were part-time. Arbitrator Snider agreed they were hired as part-timers. See fn. 12 above. Thus, for Copeland to take the position that they were covered by Section 18.01 is reflective of a good faith read of the CBA, not anti-union animus.[14]

Copeland's position that Section 18.02 requires a year's severance before vacation accruals begin, is more than a good faith read of the CBA – it is a reading consistent with the clear and unambiguous language of the CBA – a position Arbitrator Ahearn agreed with. (JX-4, page 22). It is more than a little strange for the GC to contend that correctly interpreting a CBA and insisting that the CBA be followed is evidence of anti-Union animus. Clearly, it is not.

It is also important to note that Copeland was surprised by what his payroll manager had been doing and that she had no authority to do this. (Bd. Tr. 54:1-20; Tr. 56:5 to Tr. 58:2).[15] The actions during this period of time were the result of innocent

[14] While Arbitrator Ahearn disagreed, finding that Section 18.01 did not apply and that Section 18.01 was the governing provision, that was a closely contested case in which reasonable minds could differ. Every interpretation of a CBA that is rejected by an Arbitrator does not equate to anti-union animus.

[15] The fact it took Copeland some time to discover which group of employees was at issue is not surprising. C2G is a small operation with a number of sites and a small number of corporate office employees. (Bd. Tr. 53:6 - 54:3). And C2G did have a group of employees in Alaska covered by Section 18.02 – the former CAV employees

mistakes. Certainly, there is no record evidence that Copeland or anyone at C2G exhibited hostility or even angst over the filing of the grievance. The best GC can argue is that initially Copeland was of the view that everyone was a Section 18.02 employee, not eligible for vacation accrual until a year after hire. But, as Copeland testified, once he dug into the grievance he realized that there were a group of employees (i.e. the post-October 2012 hires) who had received offer letters stating that they were part-time but had been erroneously loaded into the system by the bookkeeper as full-time employees. (Bd. Tr. 105:13 to Tr. 106:16). Unlike, the original hires from CAV, there was no agreement to treat these individuals as Section 18.02 employees. Copeland did what he thought was the right thing: he reversed course and said that since there offer letter said they were part-time, they deserved the benefit of Section 18.01 (accrual from hire). (Tr. 74:17 to Tr. 76:21). That is not the actions of a bad man acting out of anti-union animus. That is the decision of a honorable man doing the right thing.

Huggins is a bookkeeper with no college degree. She is not a CPA. C2G is a small company, not Boeing. They should not be judged by such standards. While Huggins may have made some mistakes, they were innocent mistakes and there is no evidence she or Copeland acted as they did due to any anti-union or retaliatory motivation.

(i.e. those hired before October 2012). The fact Copeland was not aware that the new hires were being incorrectly classified for vacation accrual purposes who were not grandfathered employees is hardly surprising, and not evidence of animus. Thus, to the extent GC claims Copeland's shift in positions evidences animus, this is wrong. As the old saying goes: "When my information changes, I alter my conclusions. What do you do, sir." (Variously ascribed to Winston Churchill, John Maynard Keyes and others). Copeland did the right thing when confronted with facts he did not know rather than doubling down.

Even if C2G (or Copeland) harbored animus, which they did not, this still would be insufficient to establish liability. Section 8(a)(3) does not prohibit anti-union animus, it only prohibits acting on this animus. Central Illinois Public Service Co., 326 NLRB at 934 (inchoate animus insufficient, "the standard … is ... whether the feeling did in fact motivate."); Exterior Systems, Inc., 338 NLRB 677, 694 (2002) (while evidence of hostility existed, no violation as not connected to the challenged action). Here, there is no proof that C2G's challenged actions were in any way impacted by some supposed animus.

2. There is no proof employees were discouraged from union activity or membership. A Section 8(a)(3) violation also requires proof that the employer's challenged action had the effect of encouraging or discouraging union activity or membership. See, 29 U.S.C. §158(a)(3); Dana Corp., 318 NLRB 312, 316 (1995) ("[T]o establish a prima facie violation of [Section 8(a)(3)] of the Act, the [GC] must establish … that the [challenged conduct] had the effect of encouraging or discouraging membership in a labor organization") (emphasis and parenthetical added) citing Electomedics, Inc., 299 NLRB 928, 937 aff'd 947 F.3d 953 (10th Cir. 1991); United Broadcasting Co., 253 NLRB at 703 (listing proof that challenged conduct had effect of encouraging or discouraging union activity as element of GC's case). Here the focus is on "discourage:" which is what GC pled. (Amend Complaint, ¶9).

GC failed to prove, much less present any credible evidence, that anything C2G did discouraged union activity. GC did not put on any evidence that represented employees dropped their union memberships (e.g. became agency fee members) or that the Union had a more difficult time signing up new employees as members. GC did

not even present evidence that represented employees stopped filing grievances. In fact, there was no evidence presented by Union members that they in any way were discouraged from joining the Union or engaging in Union activity. In short, there is zero evidence that Copeland's action had any "effect" on union membership or union activities.

Moreover, it is not as if C2G's alleged conduct described in ¶7 of the Amended Complaint,[16] would even have a tendency to cause dissatisfaction with the Union. The Union's position was that under Section 18.02, employees should have vacation pay accrue from date of hire. Copeland's consistent position was that vacation accrual under Section 18.02 did not begin until employees had been there a year. Of course, Arbitrator Ahearn would ultimately agree with Copeland. (JX-4, page 22). Nevertheless, even though it was adverse to his interests, in September 2015 Copeland realized that the people in question had been hired as part-time employees. (Bd. Tr. 74:17 to Tr. 75:21). In C2G's view, this meant they should accrue vacation under Section 18.01 i.e. from date of hire. (*Id.*).

In effect, GC bases her complaint on the fact that C2G switched from saying "you don't accrue vacation until you have been here a year" (allegedly contrary to some theoretical and unproven past practice) to "you start accruing vacation immediately." While the formulas in Section 18.01 and 18.02 differ, as a practical matter employees were working enough hours that under Section 18.01 they would accrue at least as much vacation (and perhaps more) than if calculated under the Section 18.02 formula.

[16] ¶8 asserted the legal theory of a Section 8(a)(3) violation. ¶¶7(c)-(e) set forth the predicate facts.

(Bd. Tr. 67:12-18). All of this was due to innocent mistakes by personnel in a small office with multiple locations and limited resources. As Copeland aptly noted: "And with a four-man shop back there, which makes me the chief financial officer, the president, and the human resource guy, I just didn't go looking for what they were accruing vacation; I just wasn't thinking about it…. And until somebody tried to take leave or… you know take vacation, the matter never came up." (JX 5, Tr. 389:21-390:10).

Arbitrator Ahearn found, in essence, that part-time employees were working a schedule and hours "indistinguishable" from full-time employees. (JX-4, p. 21). It is impossible to see how a decision to switch from "you get no vacation your first year of hire" to "you get vacation your first year of hire, and under the circumstances you will get as much (or more) than if we used the Section 18.02 formula", would "discourage" union membership or activity. The Section 8(a)(3) claim should be dismissed.

3. There is no proof of discrimination. Section 8(a)(3) does not prohibit any and all conduct by an employer that "discourages" union membership or activity. Rather, 8(a)(3) only prohibits discouragement accomplished by discrimination. Thus, in Radio Officers v. NLRB, 347 U.S. 17 (1954), the Supreme Court held:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this Section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as accomplished by discrimination is prohibited.

Id. at 42-43 (emphasis added).

Here there was no "discrimination." "The essence of discrimination in violation of Section 8(a)(3) is treating like cases differently." Midwest Regional Joint Board v. NLRB, 564 F.2d 434, 442 (D.C. 1977) (citations omitted). GC presented no evidence of

such discrimination. Copeland testified that as the original employees hired from CAV, he agreed to treat them as Section 18.02 employees and to give them credit for their time with CAV. Thus, they were not impacted by his announcement. (Bd. Tr. 72:6-21). As for those hired after October 2012 (i.e. those hired beginning April 2014, including into a new position), C2G considered them all part-time, as stated in their offer letters, and determined their vacation accrual in accordance with Section 18.01. (Bd. Tr. 74:22 – Tr. 75:6). What this means is that there was no discrimination against different groups as required for a Section 8(a)(3) violation. Guardian Industries Corp. v. NLRB, 49 F.3d 317, 319 (7th Cir. 1995). ("A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in respect that the law deems relevant … ."). [17]

The fact is that in the course of negotiating the first CBA with the Union, C2G struck a deal to treat the pre-October 2012 hires as Section 18.02 employees. (Bd. Tr. 70:6-20). C2G kept its word there. However, no such deal was struck with respect to employees that were hired beginning April 2014, or who accepted, for personal reasons, offers of part-time employment in different positions than those in which they were initially hired. These are distinct groups. Each group was treated in accord with deals Copeland struck at the table (grandfathering of CAV employees) or in accord with the CBA as interpreted and applied by C2G. And, again, Arbitrator Snider found all offers of part-time employment to be in accord with the CBA. Thus, there was no discrimination.

[17] There was no discrimination against Tulietufuga and Finney. Each of them elected to bid into a part-time position. This was found lawful by Arbitrator Snider. See fn. 12 above. By bidding into a part-time position, each of them switched from vacation accrual under Section 18.02 to Section 18.01. (Bd. Tr. 72:12-21). But each of them was different than other employees who remained in grand-fathered positions.

4. C2G's actions would have been the same regardless of any animus. Even if GC could establish that C2G changed its grievance stance out of animus, which she cannot, this does not end the inquiry. This is because C2G proved by a preponderance of the evidence that it would have made the same course correction even absent animus, even if there is a strong case of animus, Wright Line, 251 NLRB 1083, 1089 (1980); Allied Eastern States Maintenance Corp., 261 NLRB 1145, 1147-48 (1982); T&J Container Systems, 316 NLRB 771 (1995) citing GSX Corp. v. NLRB, 918 F.2d 1351, 1357 (8th Cir. 1990); Publishers' Printing Co., 317 NLRB 933, 937 (1995). Here, because GC's case is weak at best, C2G's burden is correspondingly easier to meet. Doug Hartley, Inc., 669 F.2d 579, 582 (9th Cir. 1982); Sasol North America Inc. v. NLRB, 275 F.3d 1106, 1113 (D.C. Cir. 2002).

Copeland credibly testified that the entire treatment of post-October 2012 hires as Section 18.02 employees was the result of innocent errors that he unfortunately did not catch. (Bd. Tr. 54:4-20; Bd. Tr. 56:5 to Tr. 57:13). The errors were caused by his bookkeeper incorrectly assuming that like the pre-October 2012 hires, they should have their vacation accrue from date of hire and that they should be considered as full-time employee. *Id.* But the post-October 2012 hires were not covered by the agreement to (a) treat them as Section 18.02 employees and to (b) give them credit for time served as CAV employees. (As to (b) this makes perfect sense because the post-October 2012 hires were not CAV employees so there was no past service to credit them for).

Copeland credibly testified that he believed he was bound by the offer of part-time employment contained in the post-October 2012 offer letters, to treat them as Section 18.01 employees. Copeland took this step even though he knew that treating

these individuals as covered under Section 18.01, worked against his economic interests. (Bd. Tr. 75:7 to Tr. 76:21). He was moving from a "no vacation accrual your first year of employment" to "you get vacation accrual from the date your hired." He did this because he believed it the right thing to do. *Id.*

Significantly, GC's whole Section 8(a)(3) case is predicated upon an assertion, unsupported by evidence, that Copeland was irked by the grievance seeking vacation accrual for all employees from date of hire under Section 18.02. There is no proof presented to support that contention. Section 18.02 literally states vacation accruals do not begin under that Section until after one year's employment. (JX-6, JX-1 thereto, Section 18.02). Indeed, Arbitrator Ahearn held that Section 18.02 means exactly what it says. (JX-4, page 22): Section 18.02 employees do not accrue vacation until they have been there a year, regardless of any alleged past practices. And, this position was not to C2G's immediate financial benefit. Copeland's integrity would not allow him to hide behind Section 18.02 when he believed it was inapplicable to the dispute, for his own benefit to deprive people of benefits he believed they were entitled to under Section 18.01. (Bd. Tr. 75:7 to 76:21).[18]

B. THE SECTION 8(a)(3) ALLEGATIONS ALSO SHOULD BE DISMISSED UNDER DUBO PRINCIPLES.

In Dubo Manufacturing Corp., 142 NLRB 431 (1963), the Board announced the policy that Section 8(a)(3) cases should be resolved via the CBA's grievance-arbitration machinery, if the dispute had already been submitted to that machinery. That is what

[18] Clearly, even absent animus, a prudent businessman would want to know what his CBA did or did not mean. While Arbitrator Ahearn did not conclusively decide what constitutes a "seasonal part-time" employee is, Arbitrator Snider did make clear his right to hire "part-time" employees. See, fn. 12.

happened here. Here the grievance concerning C2G's treatment of employees was filed before the filing of the ULP charge asserting the Section 8(a)(3) theory. [19]

The Union could have pursued its Board remedy by foregoing the CBA's grievance – arbitration machinery. Higgins, The Developing Labor Law, Volume I, Chapter 18. II. A, page 1599 (6th Ed. 2012). It did not elect that approach. Instead, the Union took C2G through two separate arbitrations. It should not be allowed a third bite at the apple.

If the Union wished to pursue a Section 8(a)(3) claim, it should have dropped its grievances and foregone arbitration. Having selected arbitration it should not be allowed to pursue its Section 8(a)(3) claim, per Dubo, *supra*.

C. THE SECTION 8(a)(1) ALLEGATION REGARDING THE OFFER LETTERS SHOULD BE DISMISSED.

1. The Allegations Are Time-Barred.

GC states the offer letters -- apparently their mere existence and wording -- violate Section 8(a)(1). Amended Complaint, ¶8. While this position is mistaken for reasons described below, the claim is deficient for a more substantial reason – it is time barred.

An unfair labor practice will not sound, based upon conduct occurring more than 6 months prior to the filing of a charge. 29 U.S.C. §160(c). Here the Board charge was filed November 4, 2015 and served November 5, 2015. However, as discussed in detail above, the Union knew about these letters back in 2012, and again was apprised of the same types of letters in May 2014. (JX-5, Tr. 222:18-223:13; JX-7, page 7). Certainly,

[19] The grievances were filed August 2015. The charge asserting a Section 8(a)(3) violation was filed February 19, 2016. (Amended Complaint, ¶1(b)).

the Union knew no later than May 2014 that C2G was using the offer letter at question. (*Id.*; Tr. 128:21-Tr. 129:9). May 2014 is almost 18 months prior to November 2014, when the earliest charge in this case was filed. (Amended Complaint, ¶1(a)). Thus, the Union and "clear unequivocal" notice of the letters and what they said outside the 10(b) period. Desks, Inc., 295 NLRB 1, 11 (1989). No violation can be found as to any letter issued outside the Section 10(b) period.

Union Business Agent Holan's testimony on this point is instructive. The evidence is uncontroverted that at the time Richard Tulietufuga, received his offer letter in May 2014, he informed Union Steward Ken Johnson about the part-time language in the letter, and Johnson in turn informed Business Agent Jeremy Holan. Union Steward Kenny Johnson told Holan that Johnson had received such a letter in 2012 as well. (JX-5, Tr. 222:18-223:13; JX-2, Tr. 252: 19- 255:11; 257:1-4). According to Holan: "In my line of work, I see letters like this. A lot of the companies that have numerous areas that are union and nonunion, it's a standard form letter. And with the manager telling him [Richard T] that nothing was going to change, it didn't raise any red flags for me, because the contract would prevail at that point." (JX-3 254:17-23. Holan noted that "I mean, you see them in the back of employee handbooks, also, that say you're at will, but it –it is also signed saying that a - - the CBA prevails. So there would have been no issue, because he was being paid at that time as full-time. (JX-3 Tr. 255:3-7. Holan further testified that "After Jeff Carpenter, the manager, had told him that nothing was going to change, it was – he signed it in 2012. It dropped the red flags because it was just, to me, another job offer, a standard form the company uses. The CBA is going to prevail. And so we did not move forward with it." (JX-3, Tr. 258: 2:10)."

Thus there is no question that in 2014, and as early as September 2012, the Union knew the Employer had been sending out offer letters of the type now objected to by the Union and GC as direct dealing and unlawful. Thus, there is no question the Union was aware of all the language regarding at will, changes in terms of employment, and the like now claimed as a violation of the Act, but not a concern. Indeed, even when the Union became embroiled in subsequent disputes in 2015 over vacation accrual, the particular language that is now a major point of contention by the GC was not an issue. The Union knew the CBA would prevail.

Nevertheless, the Union did not file a Board charge or a grievance in 2012. The Union did not file a Board charge or a grievance in 2014. No Board charge was filed until more than a year later after the parties could not resolve the grievances over vacation accrual and part-time status and had proceeded to arbitration.

While Finney did receive a letter with the alleged "offending language" inside the 10(b) period, the letter is identical to what the Union saw in 2014. The Section 10(b) runs from when the Charging Party (here the Union) learns of the alleged ULP. Therefore, all allegations concerning the offer letters are time barred.

2. The Letters, When Read In Context, Are Lawful.

Setting aside 10(b), the letters are lawful. GC bears the burden of proving the letters language violates Section 8(a)(1). 29. C.F.R. 101.10(b) GC did not shoulder this proof obligation. This allegation (¶8) should be dismissed.

The existence (or non-existence) of a Section 8(a)(1) violation is determined under a totality of the circumstances tests. Mediplex of Danbury, 314 NLRB 470, 472 (1994). C2G would submit that the letters be viewed through a prism commonly used

with work rules as plain meaning. Thus, there should be no presumption that employee rights are being interfered with. Thus, "particular phrases" should not be read in isolation. Lutheran Heritage Village - Livonia, 343 NLRB 646 (2004).[20] The assumption should be that employees reading the letters are aware of their legal rights, with the inquiry then being would a reasonable employee believe their rights were being impinged? T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 271 (5th Cir. 2017). When these legal standards are considered, the letter should be deemed lawful when read in context.

First, at the time the offer letter is provided, so is a copy of the handbook. The employee guidelines are specifically incorporated into, and must be read as part of, the offer letter. According to the express terms of the offer letter: "Your signature on the enclosed Employee Guidelines will signify your acceptance of this offer." (*See, e.g.,* JX-3, UX-26, 31 and 35). It is entered into contemporaneously with the offer letter and the two also must be read in context. This is significant because the employee handbook, in turn, makes clear that a CBA exists and that its terms control. (Bd. Tr. 58:5-59:2)(*See also* JX-2, UX-35, handbook signature page). And, the CBA provides that any agreement between C2G and the employee that conflicts with its terms is "null and void." (JX-6, JX-1 thereto, Section 5.02). Thus, the offer letter does not reject the language of the CBA, nor indicate that the terms of the offer letter supersede the CBA. As noted above, Holan recognized the offer letter was a form letter and knew the CBA prevailed.

[20] While Lutheran Heritage was substantially modified in a pro-employer fashion in Boeing Co., 365 NLRB No. 154 (2017), the cited principle was not impacted.

Further, the offer letter specifically references the existence (and controlling weight of the CBA) on two separate occasions (when discussing "Health and Retirement Benefits" on page 1 and when discussing "economic terms" on page 2). And, in fact, the Union meets with new hires to go over their rights.

No reasonable employee is going to read the offer letter and the handbook and assume C2G can do whatever it wishes. A CBA is simply a contract. A reasonable employee is going to recognize that a contract governs over a letter, particularly a letter which actually states it is not a contract. The letter says "neither this letter nor the previous signed Employee Guidelines are intended to create a contract of other guarantee of employment or employment terms." (*See, e.g.,* JX-3, UX-31 (emphasis added)). Ordinary people enter into contracts all the time and fully understand their binding nature. Certainly, a reasonable employee would recognize that the language in Section 5.02 of the CBA, regarding contrary agreements as being "null and void" -- means exactly that. Those words are not obscure Latin phrases only a lawyer would understand. They are common words with common meaning. Words a reasonable employee would surely understand. Indeed, if a reasonable employee could read the letter as saying C2G could (in effect) do what it wanted, when it wanted -- then the Union would have filed a charge (certainly) in 2014. No self-respecting union is going to let a company use a letter that could even plausibly (much less reasonably) be construed the way GC is twisting it to mean. And no one would ever say the Teamsters are not self-respecting. Indeed, as noted above, when Holan saw the letter he recognized this to be a form letter which was of no concern, and recognized that the CBA would prevail.

To be sure the letter references C2G's right to make changes but in each case it is restricted "by law" or "required by law." In particular, it says : "Except where otherwise stated or required by law, the terms and conditions of your employment will be set by C2G Ltd. Co. Thus, while C2G Co. Ltd. will continue to provide economic terms included in the CBA any initial terms and conditions not otherwise mandated by law or addressed in this letter or enclosed Employee Guidelines will be in accordance with C2G Ltd. Co. standard policies, procedures and/or practices. Of course, the Company reserves the right to the maximum extent permitted by law to alter or amend the terms and conditions of employment and its employment policies and procedures." (JX-3 Union Ex. 31). Obviously, the law includes 29 U.S.C. Section 185 (i.e. Section 301 and the Act itself). It therefore is clear that the terms of the offer letter were made subject to all applicable laws.

Put another way, would any reasonable employee read the letter and assume that C2G has reserved the right to pay below minimum wage or ignore overtime laws? Of course not. Then why would a reasonable employee assume it gives C2G the right to ignore a CBA (which Section 301 requires to be followed) referenced at least twice in the letter? In fact, C2G's reservation of rights is simply a shorthand way of describing what the CBA's management rights provides. (JX-6, JX-1 thereto, Section 1.03).

The letter also references at-will employment. However, the fairest read of the letter is that C2G is making clear that the letter does not alter at-will status during the initial 90 day probationary period. This is important as courts can, and do, find even in the Union environment, that side arrangements can alter at-will status. Prince v. Appalachian Reg'l. Healthcare, Inc., 2015 WL 8486179 (E.D. Kentucky, December 9,

2015). Likewise, the letter does not say the employee has no "contract or other guarantee of employment or employment terms." It says "neither this letter nor the previous signed Employee Guidelines are intended to create a contract of other guarantee of employment or employment terms." (*See, e.g.,* JX-3, UX-31 (emphasis added)). Far from trying to contract (deal) directly with the person, C2G affirmatively states it is not. The letter does not state there is no contract -- it states it is not a contract.

Tellingly, the GC has presented no evidence from any C2G employee that he or she thought the offer letter superseded the CBA, that the Employer could change employment terms at any time, or that they were at will employees. If this had been the case then certainly the GC would have presented additional evidence on this point. She did not.

Thus, the proof is in the pudding. GC's position is that the offer letter is awash with Section 8(a)(1) violations. (Bd. Tr. 28:18-29:13). But the Union knew of the letter (and its contents) since at least May 2014. (JX-7, pages 10-11). But they did not file a charge until November 2015. (Amended Complaint, ¶1(a)) Obviously, if a reasonable read of the letter included all the horribles listed by GC -- a charge would have been filed in 2014 (if not 2012). Furthermore, there is no evidence presented that employees interpreted the letter like GC does.

Likewise, the offer letter is based on a CAV letter. (Bd. Tr. 65:17-23). Can it really be said that the Union would stand by for years allowing a letter to be used that chills employees Section 7 rights without protest -- if the letter could reasonably be read to do such a thing? Put another way, it would appear to be a stain on the intelligence

and abilities of the Union to say that a "reasonable employee" could read the letter as chilling Section 7 rights, but the Union missed that read for no less than 17 months (from May 2014 -- JX-7, page 10) until the filing of the charge at issue in November 2015. (Amended Complaint, ¶1(a)). The offer letter, while not a model of clarity, clearly was drafted to comply with the CBA and applicable law. It did not chill the exercise of any rights under the Act, nor did it confuse any employees of their status. GC's arguments to the contrary are not consistent with the evidence and lacking the necessary proof.

D. THE SECTION 8(a)(5) ALLEGATIONS REGARDING THE OFFER LETTERS SHOULD BE DISMISSED.

GC alleges that the offer letters constitute direct dealing and/or altered the employees terms and conditions of employment. Amended Complaint, ¶¶6(b) and (c). In turn, GC alleges this "conduct" violated Sections 8(a)(5) of the Act. Id. ¶10. Again, GC bears the burden of proof. And, again, it is a burden GC did not shoulder. ¶¶6(b) and (c), as well as ¶10 of the Amended Complaint, should be dismissed.

First, as explained in detail in Section III C, GC's case is based on a failed and mistaken interpretation of the offer letters.

Second, none of the new hires was an employee or had even accepted employment at the time the offer letter was sent. Applicants are not employees for purposes of Section 8(a)(5). Star Tribune, 295 NLRB 543, 547 (1989). Indeed, an employer's "hiring practices generally fall into the class of business decisions … over which an employer is not obligated to bargain." Postal Service, 308 NLRB 1305, 1308 (1992). So, the Section 8(a)(5) allegation fails as to them.

Third, it is extremely difficult to see how the offer letters have "altered" anyone's terms and conditions of employment. True, the letters reference at-will employment. But, they have never been used to treat a non-probationary employee as at-will. (Bd. Tr. 60:9 to Tr. 61:2). Copeland testified that C2G has never taken the position employees may be dismissed or disciplined at will and without just cause in any grievance proceeding. (Bd. Tr. 59:21 - 61:2). Moreover, C2G acknowledged that, under the CBA, any agreement with an employee contrary to the provisions of the CBA was void. And, C2G adopted the same exact position in the employee handbook, which is incorporated into the offer letters. Likewise, in the Ahearn arbitration, C2G did not rely upon the letters regarding its interpretation of Section 18.02. It relied on Section 18.02's express language. (JX-4, page 22).

While the Union viewed Copeland's announcement in August 2015 that Section 18.02 accruals began after a year to be a change -- Copeland did not rely upon anything in the offer letters. Instead, he relied upon what Section 18.02 actually said, and his position that what Ms. Huggins had done being an unauthorized and innocent mistake. In other words, he did not point to the language quoted in ¶¶6(a)(ii) – (iv) of the Amended Complaint to claim he was doing this because there is no contract, and he can set employees terms and conditions of employment and alter them as he decided. Rather, Copeland relied on the CBA's express language and twice went through the arbitration process mandated by the CBA.

In fact, Copeland refrained from relying upon the offer letters with respect to the majority of former CAV employees (the ones hired pre-October 2012). The employees hired in October 2012 had letters stating they were part-time, but C2G did not argue that

their letters made them part-time or that C2G could change their terms and conditions at any time. There is no such evidence. Instead, C2G honored the agreement made with the Union -- they would be grandfathered as full-time. (Bd. Tr. 70:6-20).

Changes are supposed to be "material" in order to violate Sections 8(a)(5). GC must prove both that there was a change and that it was material. Provisions in an offer letter never relied upon by C2G cannot constitute a "change," much less a material change. North Star Steele Co., 347 NLRB 1364, 1367 (2006). Copeland was also very clear that he understood his offer letters did not trump the CBA. (Bd. Tr. 60:20 to 61:2.

While C2G did utilize the offer letters signed by the post-April 2014 hires with Finney and Tulietufuga, doing so did not 'alter" their terms and conditions of employment or constitute direct dealing. To the contrary, Arbitrator Snider found that C2G had a right to enter into agreements with employees so long as they did not conflict with the CBA's terms, and the terms of the CBA gave C2G the right to hire part-time employees or to create part-time positions. *See* fn. 12 above.[21]

The CBA was the product of negotiations with the Union. C2G did not bypass the Union by hiring part-time employees or creating part-time positions. C2G simply exercised a right accorded to C2G under the CBA -- a right obtained through negotiations with the Union. Whether analyzed under a "clear and unmistakable waiver" standard or a "contract coverage" standard -- Copeland (i.e. C2G) did all Section 8(a)(5) required with respect to using letters to hire part-time employees or to fill part-time

[21] Thus, even assuming arguendo that Huggins' mistake treating employees as full-time who accrued vacation in the first year and Copeland's correcting that error violated the Act, which it did not, Snider's Award conclusively establishes that the offer of part-time status in the first instance was lawful. The CBA gives C2G the right to hire part-time employees or to create part-time positions.

positions. He bargained the right to deal with employees directly so long as the deal did not violate the CBA. The CBA in turn gave him the right to hire part-timers and to create part-time employees. The Union's conduct and inaction in the face of its awareness of these letters clearly demonstrates a waiver of its rights. This is particularly true where, as here, the CBA contained an express clause indicating all subjects of bargaining were considered prior to signing the CBA. (JX-6, JX-1 thereto, Section 2.01).

E. THE SECTION 8(a)(5) ALLEGATIONS REGARDING VACATION PAY ACCRUAL SHOULD BE DISMISSED, AS SHOULD ANY ALLEGATIONS REGARDING PART-TIME STATUS.

In ¶10 of the Amended Complaint, GC asserts that via the conduct alleged in ¶7 of the Amended Complaint, C2G violated Section 8(a)(5). The heart of the allegations in ¶7 is that Copeland (a) stated certain employees were part-timers and (b) stated that employers covered by Section 18.02 did not start accruing vacation until they had been employed for a year. GC claims that taking this position is contrary to a claimed past practice of treating post -2012 hires as if Section 18.02 applied, and then changing back without bargaining over the change, notwithstanding C2G's position is in accord with the clear and unambiguous language of the CBA. It is CGC's burden to prove this allegation. 29 C.F.R. 101.10(b) and this charge cannot stand, for multiple reasons.

1. GC Did Not Meet Her Burden Of Establishing A Past Practice.

GC's entire case is predicated upon a "past practice" claim (both as to how Section 18.02 was interpreted and how certain employees were accidently classified for a relatively short period of time). GC bases her claim solely upon how during an initial contract, certain employees were, unbeknownst to C2G management due to some

innocent mistakes, treated contrary to the plain language of the CBA. However, there was no past practice.

As the proponent of a "past practice", GC must prove it. National Ship Building Co., 348 NLRB 320, 323 (2006). This includes proving that C2G was aware of it. In Re Regency Heritage Nursing & Rehab Ctr., 353 NLRB 1027, 1028 (2009) citing BSAF Wyandotte Corp., 278 NLRB 173, 180 (1986). It is difficult to see how the continuation of an error in accruing vacation for a limited period of time in a small business during the first CBA between the parties, which contradicts plain language of the contract, and also incorrectly and inadvertently failing to treat the employees according to their part-time offer letter, constitutes a binding past practice. That was not the case. Copeland, the owner of C2G, had no idea this was going on. Rather, this was the result of several innocent errors by Ms. Huggins and the fact she had not seen the part-time offer letters. Copeland then quickly acted to correct those errors. Indeed, Arbitrator Snider found this is exactly what happened. (JX-7, page 8, Item F).

Huggins is a bookkeeper with a limited education, not a CPA. C2G is a small company, not Boeing. They should not be judged by such standards. While Huggins may have made some mistakes, they were innocent mistakes and there is no evidence she or Copeland acted intentionally here.

GC does not allege Huggins is either an agent or supervisor of C2G -- so it is impossible to see how her actions can be attributable or binding upon C2G as creating a past practice. cf. Abby Island Park Manor, 267 NLRB at 170 (refusing to find liability under Act for actions of person not found to be an agent or supervisor). Significantly, Huggins' role in all of this is amply featured in the arbitration transcripts. Given that both

arbitrations were held in 2016, and the Amended Complaint issued in March 2018, if the Region believed she were an agent or supervisor, they had ample time to make that allegation.[22] Indeed, even if there had been no arbitrations – GC's failure to prove that C2G was aware of this "practice" would be fatal to the charge. BSAF Wyandotte Corp., supra.

A past practice also cannot exist where, as here, the alleged practice of accruing vacation during the first year of employment was contrary to the plain and unambiguous language of the CBA. As to the meaning of Section 18.02, that language (as Arbitrator Ahearn held) is clear and unambiguous. There is no reason to consult "past practice." LIR-USA Mfg. Co. Inc., 306 NLRB 298, 306 (1992) ("Where the contract is clear, it is unnecessary to consult the bargaining history or past practice at the plant"); Hotel Roanoke, 293 NLRB 182, 196 (1989) ("Labor contracts are normally interpreted in accordance with their unambiguous language and the matter of past practice becomes relevant only in the event of ambiguity"). And, it would take proof of open, knowing and intentional disregard of that language to follow a contrary practice to negate that language. Indeed, the Union would not assert a practice existed if the shoe was on the other foot.

There would need to be an open and notorious practice of knowingly disregarding a the contract language for an extended period of time for even considering disregarding the plain language of the CBA. It certainly would take even more when, as here, this was the first contract between the parties. A "past practice"

[22] Huggins in turn does not supervise anyone and would have no reason to know she was doing anything wrong.

normally requires an extensive period of time. Granite City Steele Co., 167 NLRB 310, 315 (1967) (past practice when employer allowed conduct to exist for 15 years); Chemical Workers, 228 NLRB 1101 (1977) (10 years); Communications Workers, 280 NLRB 78, 82 (1986) (32 years); USC University Hospital, 358 NLRB 1205, 1210 (2012) (6 years). Here this was the first contract, The first set of non-grandfathered employees were not hired until April 2014. (Bd. Tr. 66:19-24), and the error lasted all of 16 months.[23] While the Board has never set a bright line for how long is long enough, cases dealing with silent CBAs or ambiguous language are of little value here. For example, in Healthcare Services-Garden Grove, 357 NLRB 653 (2011), the CBA was silent as to the benefit at issue (a reserve sick leave plan). Id. at 656. Certainly, there were no arbitration awards stating the employer acted properly.

In contrast, in this case Section 18.02 is clear and unambiguous on its face. Moreover, there is an arbitration award confirming exactly what the CBA means. Thus, cases (like Healthcare Services) without prior arbitration awards provide no guidance.

In this case management had no knowledge of the practice as the error was committed by an individual not alleged to be a supervisor or an agent.[24] Simply put -- under the facts of this case -- 16 months is not long enough, particularly in light of the strong contract language otherwise. If an employee is covered by Section 18.02 and

[23] At the Arbitrations, the Union spent much time discussing what various prior employers may have done. Again, Copeland had no knowledge of this. (Bd. Tr. 62:14-63:24). In any event, the issue is what "past practice" did C2G create, if any, -- not what other companies have done.

[24] For example, in USC University, *supra*, it is clear that the person who created the practice was a 2(11) supervisor.

they do not begin receiving vacation accrual until they have been there a year, they are receiving exactly what the Union negotiated for them. (JX-4, p. 22).

Likewise, the employees in question characterized as part-time are in fact being treated in accordance with what their offer letter explicitly stated and what an unbiased Arbitrator found they were hired as. *See* fn. 12. It should be noted that employees often prevail in Section 8(a)(5) cases by pointing out that they acted pursuant to a good faith read of the CBA that had a "sound arguable basis." Bath Iron Works Corp., 345 NLRB 499, 501-02 (2005). Here, C2G's read had more than a "sound arguable basis." Arbitrator Ahearn agreed with C2G's read of Section 18.02 (JX-4, page 22) and Arbitrator Snider agreed that (a) the employee's in question were part-timers and (b) that the CBA authorized C2G's characterization of them as such. *See* fn. 12.

2. The ALJ Should Follow The Arbitrators Rulings Where The GC's Case Is Solely Based On The Same Record And Evidence Presented To One Or Both Arbitrators, And Where Doing So Will Best Effectuate The Purposes Of The Act While Comporting With Section 8(a)(5).

Arbitrator Snider held that under the CBA, C2G had the right to hire part-time employees, and the employees in question were hired as part-timers. *See* fn. 12 above. Likewise, Arbitrator Ahearn agreed that Section 18.02 employees do not start accruing vacation until they have been employed for a year. (JX-4, page 22). There was no finding by Ahearn that a past practice existed of accruing under Section 18.02 during the first year of the contract based on the same record and evidence on which GC asks the ALJ to rule. If Ahearn had done so, and had not accepted that any accruals for the employees in question during year one of employment was the result of an innocent mistake, Ahearn would have ruled differently than he did.

GC's continued position on the Section 8(a)(5) claim notwithstanding these awards is puzzling to say the least. In essence, GC is asking the ALJ: (1) to disregard the plain and unambiguous language of the CBA as to when vacation accrues under 18.02 for the employees in question and instead effectively rewrite what the CBA says so as to allow these employees to accrue vacation in the first year of their employment, (2) to find Arbitrator Ahearn was wrong – accruals under Section 18.02 should begin immediately, and (3) to find that Arbitrator Snider is wrong – that either C2G can't hire part-timers or, at least, the people he said were part-timers are not. *See* fn. 12.

This position ignores the purpose of Section 8(a)(5). The purpose of Section 8(a)(5) is to impose upon employers a duty to bargain in good faith. Here C2G fulfilled that duty by bargaining a CBA with the Union. There is no allegation that C2G acted in bad faith during those negotiations. When a dispute arose over the meaning of the CBA, C2G proceeded to arbitration on two separate occasions, and, in the context of this case, obtained favorable rulings. Arbitration is part of the bargained for labor agreement and in and the grievance machinery is part and parcel of the bargaining process.

GC's position is that those awards are "immaterial." (Bd. Tr. 19:4-6). But that position stands the whole point of Section 8(a)(5) on its head. The point of Section 8(a)(5) is not to simply bargain. Rather, the point of Section 8(a)(5) is to reach CBAs. Consolidated Edison v. NLRB, 305 U.S. 197, 236 (1938) ("The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining"). In turn, the courts and arbitrators are the principal sources of

contract interpretation. Litton Financial Printing Division v. NLRB, 501 U.S. 190, 202-03 (1991).

In this instance, the Arbitrators have spoken: the employees in question were properly hired as part-timers (Snider) and Section 18.02 means what it says – accruals thereunder began after a year (Ahearn). At a minimum these awards reflect the binding ruling as to what the contract means. It would be incongruous not to follow those conclusions.

C2G recognizes that the Board "is not precluded from adjudicating unfair labor practices charges even though they might have been the subject of an arbitration proceeding and award." Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964). "However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over the alleged unfair labor practice if to do so will serve the fundamental aims of the Act." Id., quoting International Harvester Co., 138 NLRB 923, 925-26 (1962); CertainTeed Corp., 2013 WL 772784 (February 28, 2013) quoting Wonder Bread, 343 NLRB 55 (2004)(same). This latter statement applies with particular force here. C2G submits that deferring to Snider and Ahearn awards will promote the purposes of the Act. "The underlying objective of the national labor laws is to promote collective bargaining and to help give substance to such agreements through the arbitration process." Carey, 375 U.S. at 265. That is exactly what the Snider/Ahearn awards do -- they give "substance" to the parties CBA. That is not "immaterial", that is directly effectuating the purposes of the Act.

Under the Olin/Spielberg line of cases this ALJ should defer to the Arbitration Awards if the arbitration proceedings: (1) appear to have been fair and regular, (2) all parties agreed to be bound, (3) the award is not clearly repugnant to the purposes and policies of the Act, (4) the ULP issue was presented to the arbitrator. *See* Olin Corp., 268 NLRB 573, 574 (1984) citing Spielberg Manufacturing Company, 112 NLRB 1080 (1955). It is the burden of the party opposing deferral to show that these standards have not been met. Id. at 574. GC did not do so. [25]

Elements 1 and 2 above cannot be seriously disputed. The proceedings were fair and regular – the ALJ can see the record of each proceeding herself. Certainly, no one would or has cast aspersions upon the character of either Arbitrator Ahearn or Arbitrator Snider. The parties agreed to be bound by the awards. (JX-6, JX-1 thereto, Article 11, p. 13). In fact, the evidence is clear that C2G has followed those Awards.

As to element 4, as the Board held in Olin:

> "Accordingly, we adopt the following standard for deferral to arbitration awards. We should find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."

Id. at 574.

The procedural posture of this case establishes both tests enunciated by Olin. This case was largely submitted on a stipulated record. GC did not present a single

[25] These standards are not impacted by the Board's decision in Babcock & Wilcox Const. Co., 361 NLRB 1127 (2014). As General Counsel Griffen explained, those standards do not apply to CBAs entered into before December 15, 2014 even if the arbitration occurs after the CBAs expiration date. GC 15-02, pages 8-10 (February 10, 2015). These arbitrations occurred under a CBA that expired September 30, 2016 and was entered into October 1, 2012. (JX-6, JX-1 thereto).

witness. GC's entire case is based upon the evidence and documents (i.e. the facts) presented to one or both of the Arbitrators. In this context, GC cannot argue that the cases are not "factually parallel" and that Arbitrators were not "generally" presented with the "relevant facts", when her entire case is based on what was presented to Arbitrators Snider and Ahearn. Nor, are the awards "clearly repugnant" to the Act. Olin, 268 NLRB at 574. In fact, both Awards are consistent with the CBA.

GC may argue that "past practice" can create rights independent of the CBA. But, as discussed above, GC has not proven the requisite knowledge needed for a binding "past practice." It may be one thing to create a non-contactual right if the CBA is silent -- but here the CBA directly, and unambiguously, speaks to the topic. And, Arbitrator Ahearn has flatly spoken to Section 18.02's meaning. Yet, GC is essentially asking the ALJ to rewrite the CBA, as confirmed by Arbitrator Ahearn, to state that employees covered by 18.02 do in fact accrue vacation during the first year of employment. This position is not supported by the law or the relevant facts. The law cannot be that it is "irrelevant" that: (a) the parties bargain in good faith to reach a CBA, (b) the CBA is clear and unambiguous as to its meaning and (c) an unbiased arbitrator (selected by the parties) reaches the same conclusion. Put another way, deeming all that "irrelevant," how could that possibly comport with the Supreme Court's directive that the purpose of the Act is entering into a CBA (Consolidated Edison, 305 U.S. at 236), and that "substance" be given to CBAs "through the arbitration process." Carey, 375 U.S. at 265.

The course urged by GC would create industrial strife -- which the Act is designed to prevent. International Harvester Co., 138 NLRB at 925-926 ("The Act … is

primarily designed to promote industrial peace and stability… Experience has demonstrated that collective bargaining agreements that provide for final and binding arbitration of grievances … contribute significantly to the attainment of this statutory objective"). It serves the purposes of the Act, to accept the Arbitrators rulings and dismiss the Section 8(a)(5) allegations. To rule in favor of GC would only create confusion, which is the handmaiden of strife. Accepting the GC's position would mean there is a duly negotiated CBA (and awards by duly selected arbitrators interpreting that CBA) that say one thing – but a separate Board ruling that says something else entirely.

3. The "Changes" In Past Practice At Issue Were Not "Material, Substantial, and Significant."

Section 8(a)(5) requires that a change be "material, substantial, and significant." Alamo Cement Co., 281 NLRB 737, 738 (1986). It is GC's burden to prove the alleged change met that standard. North Star Steele Co., 347 NLRB 1364, 1367 (2006).

In light of Arbitrator Ahearn's ruling (JX-4), calling the employees "part-time" did not work a "material, substantial and significant" change. Their schedules are "indistinguishable" from full-time employees. (JX-4, p. 21. They continue to accrue vacation under Section 18.02 just like when they were full-time. (JX-4). And, having them accrue vacation after one year simply gives them what the Union actually negotiated. If an employee is asked who is his exclusive bargaining agent, he will respond the "Teamsters" -- not Carol Huggins or Tom Copeland.

4. The Allegations Regarding The "Change" As To The Meaning Of Section 18.02's Accrual Are Time Barred.

The issue of when vacation begins to accrue under Section 18.02 was triggered by the resignation of Mike Smith. (Bd. Tr. 73:10-14). Smith filed a grievance on August

15, 2015. (JX-4, page 10). The Section 8(a)(5) issues related to vacation accrual were not raised until the filing of charge 19-CA-169910, which was not filed until February 16, 2016 and not served until February 18, 2016. A change must be both filed and served within the 10(b) period. (Amended Complaint, ¶1(b)). Both dates are more than 6 months after August 15, 2015. Thus, the Union knew more than six months prior to February 18, 2016 about that, according to C2G, Section 18.02 meant what it said. Therefore, any ULP regarding that change is time barred. 29 U.S.C. 160(b).[26]

IV. **CONCLUSION**

Tom Copeland credibly testify that his actions and those of his company were not the result of anti-union animus or retaliatory motivation, but were cause by innocent inadvertent mistakes and his subsequent efforts to abide by the CBA and the particular type of job offered even to his economic disadvantage. No past practice existed.. The offer letters in question are clearly subject to the terms of the CBA by their own terms, express an intent to abide by the CBA and applicable law, and have not created any evidence of confusion on the part of union members as to their rights or C2G's contractual obligations. GC cannot establish a past practice that conflicts with plain and unambiguous contract language particularly where there is no knowing and intentional adoption of a practice, but rather the payroll calculations were the product of innocent errors at a small business. To conclude otherwise would override the express language of the CBA and rewrite the contract.

[26] The Union may not have learned C2G's position that post-October 2012 employees were part-timers until September 21, 2015. But they knew C2G's position that Section 18.02 meant what it said no later than August 15, 2015 -- outside the 10(b) period.

Arbitrators Snider and Ahearn have spoken to what the CBA entitles employees to. C2G has never taken an action in this case driven by anti-union animus. The offer letters when, properly construed as a whole, do not violate the Act and in fact confirm the CBA is controlling. For all the foregoing reasons, and the record testimony, the Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2018, the foregoing Post Hearing Brief Of C2G LTD Co. has been served, as indicated, simultaneously upon the following via U.S. Mail, postage prepaid, electronic mail, and the National Labor Relations Board Online Portal:

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